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THE EXTENT OF THE JUDICIAL POWER OF THE UNITED STATES

In marking out the powers of the three departments of the government of the United States, quite different forms of expression are employed.

Art. I, Sec. 1, declares that "All legislative Powers herein granted shall be vested in a Congress of the United States." Art. I, Sec. 8, provides that "The Congress shall have Power to" pass laws on certain specified subjects, and also "all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof."

Art. II, Sec. 1, declares that "The Executive Power shall be vested in a President of the United States of America;" and that he shall take an oath that he will faithfully execute the office "of President of the United States." Art. II, Sections 2 and 3, confer upon him certain specified powers, one being that "he shall take care that the Laws be faithfully executed."

Art. III, declares (Sec. 1.) that "The judicial Power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish;" and (Sec. 2) that

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public

Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the citizens thereof, and foreign States, Citizens, or Subjects.”

“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, The Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”

The Tenth Amendment provides that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

In legal theory, the people of the several States of the United States, by the action of a majority of the people in each State taken within that State, delegated certain powers, which either these States or peoples or the whole people of the United States had theretofore possessed, to the United States of America.

It was not clear, on the face of the Tenth Amendment, whether in the provision that the powers not so delegated were reserved to the States respectively or to the people, the word “people” meant the people of the States respectively, or the people of the United States as a whole.

The phrase “or to the people” was added to the draft of the Amendment as originally reported to the first Congress, on the motion of Roger Sherman, and without debate. He probably designed to leave what these words meant to be settled later by the courts. To have made the alternative reservation expressly to the people of the United States would have been unpalatable to the small States. To have made it expressly to the people of each State respectively would have been unpalatable to the nationalists.

In framing the Constitution of the Confederate States of America, adopted March 11, 1861, the language of the Tenth Amendment was incorporated, with the addition at the end of the word “thereof;” and in the same spirit the language of the Ninth Amendment was incorporated with the addition at the end of the

words "of the several States."¹ It is significant that while these changes were obviously made in the interest of the "States' Rights" doctrine, no substantial alteration was introduced in following the terms of Art. III of the Constitution of the United States respecting the establishment of the judicial power.

It may safely be said that those who framed that instrument meant to have it both create and define that power, and that the people in adopting it believed that this had been done. None of those who spoke against its ratification in the State Conventions ever claimed that any judicial powers were granted except those expressly enumerated, and such as were properly incident to them. It was argued with great force that some of the enumerated powers were too broad, but no one suggested that there were other powers, inherent in sovereignty, which the government, as re-constituted, would therefore possess. Had it been suggested and generally admitted, the Constitution would, in all probability, never have been ratified.

James Wilson, in the Pennsylvania Convention, gave particular attention to the defence of the scheme of a Federal judiciary, and assumed from the outset that it made specific grants of authority. "Upon a distinct examination," he said, "of the different powers, I presume it will be found that not one of them is unnecessary. I will go farther—there is not one of them but will be discovered to be of such a nature as to be attended with very important advantages."²

The Federalist treated the subject in a similar way. In No. LXXX, after a discussion of the principles that ought *a priori* to regulate the constitution of the Federal judiciary, Publius (i. e. Hamilton) continues thus: "We will proceed to test by these principles the particular powers of which, according to the plan of the Convention, it is to be composed."

The provisions made having been then stated, he observes that "This constitutes the entire mass of the judicial authority of the United States." He then examines each provision by itself, and concludes thus:

"From this review of the particular powers of the federal judiciary, as marked out in the constitution, it appears, that they are all conformable to the principles which ought to have governed

¹ Davis, Rise and Fall of the Confederate Government, I, 672; *Cf. ibid.*, 146, 158.

² Elliot's Debates, II, 486.

the structure of that department, and which were necessary to the perfection of that system."

Continuing the discussion in No. LXXXI, he says that "The amount of the observations hitherto made on the authority of the judicial department is this: That it has been carefully restricted to those causes which are manifestly proper for the cognizance of the national judicature."

In No. LXXXIII, after remarking that Congress has only certain enumerated powers and no general legislative authority, he makes this explicit observation:

"In like manner, the authority of the federal judicatures, is declared by the constitution to comprehend certain cases particularly specified. The expression of those cases, marks the precise limits beyond which the federal courts cannot extend their jurisdiction; because the objects of their cognizance being enumerated, the specification would be nugatory, if it did not exclude all ideas of more extensive authority."

In *Chisholm v. Georgia*, Justice Jay, after premising that the preamble of the Constitution declared one of its main purposes was to "establish justice," proceeded thus:

"It may be asked, what is the precise sense and latitude in which the words 'to establish justice,' as here used, are to be understood? The answer to this question will result from the provisions made in the Constitution on this head. They are specified in the 2d section of the 3d article, where it is ordained, that the judicial power of the United States shall extend to ten descriptions of cases, viz. 1st. To all cases arising under this Constitution; because the meaning, construction, and operation of a compact ought always to be ascertained by all the parties, or³ by authority derived only from one of them. 2d. To all cases arising under the laws of the United States; because as such laws constitutionally made, are obligatory on each State, the measure of obligation and obedience ought not to be decided and fixed by the party from whom they are due, but by a tribunal deriving authority from both the parties."

Then follows a similar statement of each remaining one of the ten grants, with its justification, concluding in these words:

"Even this cursory view of the judicial powers of the United States, leaves the mind strongly impressed with the importance

³ Ru. Should *or* read not?

of them to the preservation of the tranquility, the equal sovereignty, and the equal right of the people.”⁴

Mr. Justice Story, in speaking for the court in the great case of *Martin v. Hunter’s Lessee*, after saying that the language of the Constitution requires Congress to vest the whole judicial power of the United States in their courts, proceeds thus:

“It being then established that the language of this clause is imperative, the next question is as to the cases to which it shall apply. The answer is found in the Constitution itself. The judicial power shall extend to all the cases enumerated in the Constitution.”

So Daniel Webster, a few years later, observed in the House of Representatives that “the Constitution defines what shall be the objects of judicial power,”⁵ and Mr. Justice Miller, in his lectures on the Constitution, given in 1889, remarks that Art. III, Sec. II, “defines or marks out the judicial power of the United States by providing to what case it may extend.”⁶

It would seem that both on principle and authority this doctrine must be sound; but it is difficult to reconcile it with some observations in the recent case of *Kansas v. Colorado*, 206 U. S., 46.

“By reason of the fact,” says the court (pp. 81, 82) through Mr. Justice Brewer, “that there is no general grant of legislative power it has become an accepted constitutional rule that this is a government of enumerated powers.” . . . “On the other hand, in Article III, which treats of the judicial department—and this is important for our present consideration—we find that section 1 reads that ‘the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.’ By this is granted the entire judicial power of the Nation. Section 2, which provides that ‘the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States,’ etc., is not a limitation nor an enumeration. It is a definite declaration, a provision that the judicial power shall extend to—that is, shall include—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power. There may be, of course, limitations on that

⁴ 2 Dallas, 475, 476.

⁵ Elliot’s Debates, IV, 478.

⁶ Miller on the Constitution of the United States, 337.

grant of power, but if there are any they must be expressed, for otherwise the general grant would vest in the courts all the judicial power which the new Nation was capable of exercising."

"Speaking generally," the opinion proceeds, (p. 83) "it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature the parties to which or the property involved in which may be reached by judicial process; and when the judicial power of the United States was vested in the Supreme and other courts all the judicial power which the Nation was capable of exercising was vested in those tribunals, and unless there be some limitations expressed in the Constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the Nation, no matter who may be the parties thereto." . . . "These considerations lead to the propositions that when a legislative power is claimed for the National Government the question is whether that power is one of those granted by the Constitution, either in terms or by necessary implication, whereas in respect to judicial functions the question is whether there be any limitations expressed in the Constitution on the general grant of national power."

In the same vein, the opinion thus disposes of the question as to the meaning of the Tenth Amendment, in favor of the nationalist side of the controversy (p. 90).

"The argument of counsel ignores the principal factor in this article, to wit, 'the people.' Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it, 'we the people of the United States,' not the people of one State, but the people of all the States, and Article X reserves to the people of all the States the powers not delegated to the United States. The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the

United States, and after making provisions for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated."

It may well be doubted whether some of the expressions which have been quoted fully represent the views of the court. If taken in their natural sense, they seem authority for the proposition that every controversy which can properly be made the subject of a law suit, and arises within the territorial limits of the United States, no matter who may be the parties thereto, may be given over by Congress for final disposition to the Federal courts. A suit, for instance, on a note of hand made by a citizen of New York in favor of and held by a citizen of New York, and there payable, could, if Congress so willed, be maintained in the Circuit Court of the United States, although no question of Federal right were in any way involved in the cause of action or in the defence.

This result is reached by assuming that the entire judicial power of the United States was granted by the Constitution in general words to the courts of the United States and that this power comprised, except so far as limitations were elsewhere expressed, all the judicial power which the new nation was capable of exercising.

A letter written by Jefferson during his last years contains this passage:

"It has long, however, been my opinion, and I have never shrunk from its expression, (although I do not choose to put it into a newspaper, nor, like a Priam in armor, offer myself its champion), that the germ of dissolution of our federal government is in the constitution of the federal judiciary; an irresponsible body (for impeachment is scarcely a scare-crow), working like gravity by night and by day, gaining a little to-day and a little to-morrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the States, and the government of all be consolidated into one. To this I am opposed; because, when all government, domestic and foreign, in little as in great things, shall be drawn to Washington as the centre of all power, it will render powerless the checks provided of one government on another, and will become as venal and oppressive as the government from which we separated."⁷

Had our third President lived to the present day, he would have been apt to think that his forebodings were coming true.

⁷ The Works of Thomas Jefferson, Library Ed., XV, 331.

It is, however, to be observed that none of the observations of the court in *Kansas v. Colorado* which have been quoted related to points vital to the decision.

The Constitution expressly declares that the judicial power shall extend "to Controversies to which the United States shall be a party," and "to Controversies between two or more States." *Kansas* had a controversy with *Colorado*. They could not settle it by fighting. The Constitution provided another and a peaceful remedy. *Kansas* resorted to it. The action which she brought involved a controversy in which the United States had or claimed an interest. They therefore could properly seek to intervene as a party, and were admitted, as such.

The original suit had on demurrer, several years before, been held to be well brought, on the ground that that it presented a controversy made justiciable by the Constitution, because it was a controversy between States. *Kansas v. Colorado*, 185 U. S., 125, 141. There was nothing in the facts reported by the Commissioner, to whom the cause had been referred, to shake this basis of jurisdiction. It rested on the settled principle that there were two grounds, on either of which a suit might be maintained in the Federal courts; one where the cause of action was of a kind that had been committed to their care; and one where the parties had been made subject to their power.

The observations of Mr. Justice Brewer, in which it does not appear that Mr. Justice White or Mr. Justice McKenna concurred, and for which Mr. Justice Moody was under no responsibility, (p. 118) seem therefore fairly to fall within the category of *obiter dicta*.

Chief Justice Marshall, in *Cohens vs. Virginia* (6 Wheaton, 264) observed of one of his own greatest opinions, that while the decision which it announced was right, he had taken positions in the reasoning by which he had sought to support it which were untenable. He then proceeded to say that the Constitution gave the United States judicial power over all cases arising under the Constitution or laws of the United States without respect to parties. Many years afterwards the court declared that this last remark was an *obiter dictum*, and not to be taken as authoritative *Hans vs. Louisiana*, 134 U. S., 1, 20. It would not be surprising if Mr. Justice Brewer himself should, as years go on, find an opportunity to take the course so honorably followed by Marshall in *Cohens vs. Virginia*. If the writer of a judicial opinion has per-

mitted his pen to move too fast, and gone beyond the exigencies of the case, it is the strength of our system of remedial justice that his words lose their authority, as soon as the bounds of necessity are passed.

Simeon E. Baldwin.